

## **NOTE on Sexual Harassment in the Workplace**

We have been asked by the Federation of Scottish Theatre to provide a general guidance note on the legal and practical issues that arise in seeking to prevent sexual harassment occurring at work in the theatre sector and how to tackle issues should they arise.

### **What is Sexual Harassment? – The legal framework**

A person (“**A**”) sexually harasses another (“**B**”) where:

- **A** engages in unwanted conduct of a sexual nature; and
- The conduct has the purpose or effect of either violating **B**’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for **B**.

(Section 26(2) Equality Act 2010 (EqA).

An “employee” for the purposes of the EqA encompasses anyone who is engaged under a contract of employment, a contract of apprenticeship or a contract personally to do work. This means that job applicants, employees, workers and a wider category of individuals who are self-employed, provided their contract requires them to perform their work personally, are encompassed by the EqA. Further, the majority of freelancers working in the theatre sector are likely to fall under these provisions of the EqA.

#### Unwanted conduct of a Sexual Nature

The Equality and Human Rights Commission’s Statutory Code (EHRC Code) advises that the word “unwanted” means the same as “unwelcome” or “uninvited”. A single incident can be enough to constitute harassment. The fact that an employee has put up with “banter” for years does not mean that it cannot be unwanted. Equally an employee may succeed in a claim for sexual harassment when a consensual relationship ends and the other party’s conduct becomes unwanted. “Conduct of a sexual nature” covers a wide range of behaviour and could include sexual comments or jokes, propositions and sexual advances, sexual posts on social media, unwelcome touching, hugging, kissing and sexual assault.

#### Purpose or effect

If A’s unwanted conduct of a sexual nature is shown to have the *purpose* of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider if it has that *effect* and the reasonableness of B’s perception is not relevant.

Where A’s conduct is not shown to have that purpose, the *effect* of their conduct on B must be determined. In determining whether the conduct has the *effect* of violating B’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, each of the following must be taken into account:

- B’s perception

- The other circumstances of the case
- Whether it is reasonable for the conduct to have that effect.

### B's perception

The effect is assessed from B's *perspective* and from their subjective view point. It does not matter whether A *intended* to create an intimidating, hostile, degrading, humiliating or offensive environment for B. The test is, did it have that effect for B.

### Relevant Circumstances

The EHRC Code advises that relevant *circumstances* that may need to be taken into account could include the personal circumstances of A, such as their health, cultural norms, or previous experience of harassment and also the environment in which the conduct takes place. The fact that B is in a more senior position or is able to exert power from their position can certainly be a relevant circumstance.

### Reasonableness of effect

Whether it was *reasonable* for A's conduct to have the effect it did on B is an objective test. A's conduct will only be considered as having the necessary effect on B where it is *reasonable* for the conduct to have that effect. Therefore, provided any offence caused is unintentional there will be no harassment if the victim is "hypersensitive".

### Who is liable?

As with other breaches of the EqA, employers are normally liable for the sexual harassment committed by their employees during the course of their employment, regardless of whether the employee's acts were done with the employer's prior knowledge or approval.

An employer will not, however, be liable for a criminal offence committed by the employee under the EqA.

An employer may avoid liability for the sexual harassment by an employee where it can demonstrate that it took "all reasonable steps" to prevent the harassment. Reasonable steps can include regularly training employees in equal opportunities and harassment issues and taking steps to deal effectively with complaints – such as promptly and thoroughly investigating complaints and taking appropriate disciplinary action where necessary. The EHRC's technical guidance ("EHRC Guide") also advises that all employers should have in place:

- An anti-harassment policy that is communicated to its workers and is effectively implemented, monitored and reviewed.
- An appropriate procedure for reporting harassment, protecting victims of harassment and taking action if harassment occurs.

An employee who is sexually harassed can bring a claim against their employer and also against the individual(s) who perpetrated the harassment, who may become personally liable to pay compensation to the victim.

## Recognising the extent of the problem

Arguably, for an employer to create a workplace culture that minimises the risk of sexual harassment, it needs to understand the extent of its current problem.

The Stage magazine's 2018 survey, Harassment and Bullying in the Theatre Sector, reported that 31% of respondents said they had suffered sexual harassment.

ComRes, in their 2017 research on sexual harassment in the workplace for the BBC, reported that 40% of women (and 18% of men) have experienced unwanted sexual behavior at work at some point.

However, the Women and Equalities Select Committee ("WESC") July 2018 report found that there was a lack of awareness at the most senior levels of employers about the extent of sexual harassment in their organisations.

In January 2020 the UK Government Equalities Office launched one of the biggest surveys of its kind asking people about their experience of sexual harassment inside and outside the workspace. The results of the survey are not yet known.

## Preventing sexual harassment in the workplace

Taking appropriate steps to prevent sexual harassment in the workplace is important for all employers. Complaints of sexual harassment can lead to adverse effects on employees, damage to reputation, unwelcome publicity, expensive litigation and costly settlements. It can also lead to police investigations, criminal proceedings and the potential closure of the employer's operation.

As those in the theatre sector will be aware one of the products of Equity's Agenda For Change campaign has been **Safe Spaces**. The campaign seeks to give their members the confidence to challenge and report inappropriate behaviour. This is backed by the Safe Spaces statement which is to be read out aloud at the beginning of a production's rehearsal period.

There are a range of effective measures which an employer can consider taking which include:

- Creating a work place culture of zero-tolerance to harassment and where all employees are encouraged to report inappropriate behaviour. This can be bolstered by having clear organisational values and behaviours which are championed by the Board of Trustees.
- Investigating the extent of the problem in the organisation and identifying any areas of risk.
- Having an effective anti-harassment policy that clearly sets out what conduct is unacceptable, the employer's zero-tolerance approach to such conduct, how employees can report inappropriate conduct, the process that will be followed and the support available for victims of harassment and those who report it.
- Having effective reporting mechanisms in place and ensuring all employees are aware of them.
- Ensuring managers deal with complaints of harassment quickly, effectively and in a sensitive way, so that perpetrators of harassment are sanctioned and those who report harassment are protected from victimisation.
- Providing anti-harassment training for all employees, given at induction onwards and specific training for managers in how to deal with complaints of harassment.
- Having nominated employees to monitor harassment issues and offer support to victims of harassment.

- Ensuring third parties such as suppliers and audience members are aware of the employer's zero-tolerance policy to harassment and that employees are aware that it will take reports of harassment by third parties and audience members seriously.
- Ensuring its policies provide adequate protection and the right to report sexual harassment to all workers (for example by including volunteers and interns).

### Statutory Code of Practice on sexual harassment

The EHRC Code is a statutory code which came into force in 2011. It provides guidance to organisations on all aspects of the EqA, including sexual harassment. Tribunals and Courts are obliged to take account of the EHRC Code in determining complaints under the EqA. However, following recommendations by the EHRC and WESC the government confirmed its intention to introduce a statutory code of practice on sexual harassment at work, which would specify the steps that employers should take to prevent and respond to sexual harassment in the workplace. The government asked the EHRC to develop the code. On 15 January 2020, the EHRC published the EHRC Guide. The EHRC states on its website that the Guide is expected to become a statutory code of practice in due course.

Following WESC's recommendation duty the UK Government has consulted on whether to introduce a mandatory duty to protect employees from sexual harassment. The outcome was expected in Spring 2020 but has been delayed.

If a mandatory duty were introduced, this would enable the EHRC to take enforcement action against employers who breach the duty without the need for an employee to first bring an employment tribunal claim.

### **Investigating sexual harassment allegations**

A fair and thorough internal investigation and grievance or complaint procedure can play an important role in resolving a sexual harassment complaint.

The organisation should investigate all allegations of sexual harassment even where the person raising the complaint does not wish to raise a formal complaint or has left the employer's employment.

As a result of COVID19 investigations and resultant meetings are likely to take place remotely.

### Appointing an investigator

Guidance on appointing a suitable investigator is set out the ACAS guide to conducting workplace investigations (ACAS Investigation Guide).

Ideally, the investigator should be specially trained in dealing with sexual harassment cases (page 4, ACAS Investigation Guide). If there is no one in the employer's organisation who is suitably trained, the employer may wish to appoint an external investigator. However this need not be the default position.

### The investigation

The EHRC Guide provides the following advice to employers investigating sexual harassment allegations:

- Target timescales for each stage of the process should be set and communicated to the complainant. The timescales should be reasonably achievable and provide for a prompt but thorough process. The employer should keep to the timescales set other than in exceptional circumstances.

- The employer should provide the complainant with regular updates on progress and, if required, a clear explanation of why timescales have not been met.
- Roles and responsibilities during the process should be clearly defined with independence and objectivity ensured at each stage of the process. Where possible, different people at escalating levels of seniority, who have not been previously involved in the issue should conduct the investigation, formal hearing and appeal hearing phases.
- The employer should take into account the particular sensitivities of the case. For example a woman who has been sexually assaulted may be more comfortable talking to a female investigator.
- Investigators should clearly identify the facts they need to establish, the questions they will need to ask and the evidence they will need to obtain.
- Where evidence emerges that the employee has been harassed a disciplinary investigation should be commenced against the perpetrator as promptly as possible.

### Right to be accompanied

The EHRC Guide advises that the complainant and the alleged harasser should be informed of their statutory right to be accompanied to the formal grievance hearing by a trade union representative or a colleague. Employers should also consider extending the right to be accompanied to other meetings such as an investigation meeting where reasonable. Employers should also consider extending the right to be accompanied, to allow persons other than colleagues or trade union representatives where appropriate, bearing in mind the need to maintain confidentiality in the investigation. In certain circumstances employers must extend the right to be accompanied to comply with certain legal obligations for example to comply with the duty to make reasonable adjustments for an employee with a disability.

### Reluctant witnesses

There will be cases where an employee informs their employer that they have been harassed but they do not wish to take the matter further. Investigating a harassment claim without the cooperation or evidence of the employee who has been harassed may prove extremely difficult and some employers may consider that they have no duty to investigate in such circumstances. However an employer who fails to carry out an investigation at all in such a case could expose itself to risk where, for example:

- The perpetrator goes on to harass another employee.
- The original employee decides to bring an employment tribunal claim.

The employer will be unlikely to be able to rely on the “reasonable steps” defence in such scenarios.

The EHRC Guide advises that even where an employee asks their employer not to take the matter any further, the employer should still take reasonable steps to ensure that the matter is resolved, including:

- Keeping a record of the complaint and the employee’s request to keep it confidential.
- Encouraging the employee to address the issue informally either directly themselves or with support.
- Providing the employee with any necessary support and guidance on how to address the issue informally.
- Keeping the situation under review by checking in with the employee to find out if the situation has improved.

- Where the situation has not improved, explaining to the employee that it is necessary to address the issue for their wellbeing and that of their colleagues

The EHRC Guide advises that, where possible, the employer should respect the wishes of the employee, as not doing so could compound the harm caused by the original conduct. However, there may be circumstances in which the employer should take action because the risk of not doing so outweighs the risk arising from overriding the complainant's wishes. For example, it may be appropriate to take further action where the harassment is so serious that there is an immediate risk to the safety of the complainant, their colleagues, or anyone else that the harasser may come into contact with. The risks may be higher where criminal behaviour is alleged to have taken place (paragraph 5.50 – 5.51 EHRC Guide).

If the employer decides that it *must* take formal action despite the employee's wishes, it should explain its decision to the employee and ensure that it has put in place appropriate safeguards to prevent them from being further harassed or victimised and arrange support and counselling for the employee to deal with any impact the decision may have (para 5.52 EHRC Guide).

Some reluctant witnesses may be persuaded to give evidence if further reassurances of confidentiality and support can be given. The employer should explore with the employee their reasons for being unwilling to give evidence and see if it can resolve any of their concerns.

### Confidentiality

The EHRC Guide advises that an employer should ensure that a complaint is kept confidential during the investigation, subject to any legal obligations or rights such as a requirement to report to the regulator (for example, depending on the circumstances, it may be that a report is required to be made by the Trustees to OSCR as a Notifiable Event).

The investigator should ensure that any witnesses they speak to about the complaint are made aware that the matter is confidential (subject to any personal, legal or regulatory obligations or rights) and a breach of confidentiality will be a disciplinary offence (paragraph 5.48 EHRC Guide).

Confidentiality should not, however, necessarily, continue once the complaints process has been concluded. The EHRC guide advises that, to be effective in encouraging those with complaints to come forward, the outcome to a formal complaint of harassment should be as transparent as possible. This means that wherever appropriate and possible, if a complaint is upheld then the complainant should be told what action has been taken to address this, including action taken to address the specific complaint and any measures taken to prevent a similar event happening again in the future. If the complainant is not told what action has been taken, this may leave them feeling that their complaint has not been taken seriously or addressed adequately (para 5.66 EHRC Guide).

### Anonymity

It is not uncommon for a reluctant witness to request anonymity as a condition of providing evidence in a harassment complaint. However, the employer has a duty to conduct the investigation fairly from the perspective of all the parties concerned, including the alleged perpetrator. It is important that the individual accused of harassment is given the full details of the complaint made against them as it will be extremely difficult if not impossible for them to fully respond without knowing who has accused them.

The ACAS Investigations Guide states that "only in exceptional circumstances where a witness has genuine fear of reprisals should an investigator agree that a witness statement is anonymised" (Page 24). However in

such a situation, the employer should make the employee aware that if the matter becomes subject to legal proceedings, the employer may be required to disclose their name.

### Involving the Police

The employer should consider at an early stage whether the allegations constitute a potential criminal offence and whether the police should be informed.

There can be an overlap between behaviour that constitutes sexual harassment under the EqA and criminal offences, including sexual assault, indecent exposure, voyeurism, stalking and offensive communications.

However, the decision whether to inform the police should be the employee's, unless the employer considers that there is immediate risk of harm to the employee or another individual. Without the complainant's co-operation the police are unlikely to be able to take any action.

Where the police are involved, they may attempt to dictate the scope of the employer's investigation to ensure it does not interfere with criminal evidence. The employer should therefore liaise with the police regarding its investigation and the disciplinary process taken against the perpetrator. This can sometimes create issues of delay and difficulties in communication which need to be addressed sensitively. The police's interests are often about securing the best evidence for their potential investigation.

The EHRC guide advises that an employer should not assume that it cannot take any action to investigate the matter until police enquiries have concluded. The employer should check with the police that it can carry out its own investigation without prejudicing any criminal process.

The ACAS guide to Sexual Harassment advises that if a complaint is reported to the police, or criminal court proceedings are being pursued, an employer must still investigate the complaint as an employment matter. It may then follow its disciplinary without awaiting the outcome of the criminal proceedings, provided that can be done fairly. Non statutory ACAS guidance on Discipline and Grievances at Work also states that "where the matter requires prompt attention the employer need not await the outcome of the prosecution before taking fair and reasonable action".

### Victim Support

It is important that those who report harassment are offered appropriate support by their employer. Employers should consider offering access to external specialist support in appropriate cases such as counselling services.

Employers should ensure that those who report sexual harassment are kept regularly up to date with the progress of the employer's investigation.

### Dealing with the alleged perpetrator

Being accused of sexual harassment can also have a significant impact on the accused. Employers should ensure that an employee accused of sexual harassment is dealt with in a sensitive way and that no presumption of guilt is made.

The employee accused of harassment should be interviewed at an early stage in the investigation and given the opportunity to put across their view of events. They should be given sufficient information about the nature of the allegations against them to allow them to fully answer them.

As far as possible the employer should ensure that the investigation into the allegations against the accused is kept confidential, while balancing the need to obtain evidence from other witnesses.

The employer should consider carefully whether it is necessary to suspend the accused pending the investigation into the complaint. Suspension must be justified and not a knee-jerk action. If the employer considers that there is sufficient evidence to take disciplinary action against the employee, a thorough disciplinary process should be followed.

The key principles applicable in to employment investigations would generally also be applicable to workplace investigations outwith the employment context. So, for example where a self-employed freelancer makes an allegation against another freelancer. Neither may be employees in the traditional sense (and to whom the organisations employment policies may not apply) however they would come under the wider definition of “employee” in the EqA. In such circumstances the manner in which the complaint is investigated may be different for example the grievance policy might not apply but a complaint policy or another fair process may be followed instead.

### **The use of confidentiality clauses and Non Disclosure Agreements (NDA’s)**

NDA’s were traditionally used in commercial transactions to protect trade secrets and commercially sensitive information. In an employment context they are rarely stand alone agreements but are usually found as part of a Settlement Agreement. These Settlement Agreements are binding agreements are a result of which an employee agrees to waive any rights they may have against an employer in return normally for financial compensation. To be binding an employee has to receive independent legal advice.

Confidentiality clauses in Settlement Agreements can arguably benefit the employee as well as the employer. Their use allows the employee to move on from their dispute knowing what it has been agreed will be said about their departure without fear that any of the history will be disclosed in the future to other parties, such as future employers. However, not all confidentiality clauses are enforceable e.g. those which seek to prevent an individual making an allegation of sexual harassment will be void if the allegations amounts to a “protected disclosure” (commonly known as whistleblowing).

Confidentiality clauses and NDA’s have come under increased scrutiny and criticism due to concerns that they have been used to deter victims of harassment from speaking out even when they are legally unenforceable.

While it has traditionally been standard practice for Settlement Agreements to include confidentiality provisions, where sexual harassment has been alleged it is worth considering whether one is actually required.

The UK Government have confirmed that they will be introducing legislation curbing the use of NDA provisions in contracts of employment and Settlement Agreements.

### **Reform**

The UK Government’s response to the WESC report on 18 December 2019 stated that it will seek reform in this area of law in a number of important ways and are currently consulting on –

- Whether to introduce a mandatory duty to protect workers from sexual harassment.
- How best to strengthen and clarify laws in relation to third party harassment
- Extending the time limit to bring claims of sexual harassment from 3 to 6 months

- Whether new protections are necessary to protect interns and volunteers.

The response to this consultation was expected to be published in Spring 2020 but has been delayed. It may well be there are to be major reforms in this area of law.

### **Conclusion**

It is important that all employers take steps to prevent sexual harassment occurring at work and to deal swiftly and effectively with any issues should they arise. We hope that this general guidance note is of assistance to FST members and should any member wish to explore any specific issues please do not hesitate to contact either Barry Nichol (0131 625 7238 or at [barry.nichol@andersonstrathern.co.uk](mailto:barry.nichol@andersonstrathern.co.uk)) or Mandy Armstrong (0131 270 7719) or at [mandy.armstrong@andersonstrathern.co.uk](mailto:mandy.armstrong@andersonstrathern.co.uk)).

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